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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 228

In Re: Estate of Patrick Sexton, Deceased.

JAMES F. SEXTON,
Petitioner,

vs.

EARNSHORE M. BARRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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TABLE OF CONTENTS.

Opinions Below ---------- 1

Jurisdiction ---------- 2

Questions Presented ---------- 3

Constitutional Provisions and Statutes Involved---- 4

Statement of the Case ---------- 4

Reasons for Allowing the Writ ---------- 13

A. The Supreme Court's Decision ---------- 13

1. Did the Supreme Court of the State of Ohio err in reversing the judgment of the Court of Appeals for the Seventh Judicial District of the State of Ohio? ---------- 13

2. Did the Supreme Court of the State of Ohio decide the instant cause contrary to the property rights of the petitioner as those rights are guaranteed to the petitioner by the Fourteenth Amendment to the Constitution of the United States of America?-- 13

B. The Fourteenth Amendment—An Impartial Tribunal ---------- 17

3. Did the Supreme Court of the State of Ohio err by deciding the instant cause at a time when the said Supreme Court was a defendant in litigation then pending against it and in which this petitioner was party together with said Supreme Court and Chief Justice thereof also being parties?-- 17

4. Did the Supreme Court of the State of Ohio err in failing on its own motion to disqualify five members of its Court as constituted at the time of hearing in its court? 17

5. Did the Supreme Court of the State of Ohio err in failing to award to this petitioner due process of law and equal protection of the law as those guarantees are made by the Fourteenth Amendment to the Constitution of the United States? ---------- 17

C. The District Court Proceedings ---------- 18

6. Did the Supreme Court of the State of Ohio err in deciding the instant cause pending the District Court proceedings and all appeals involved therein? ---------- 18

Conclusion ---------- 20

APPENDIX:

1. Judgment of Supreme Court of the State of Ohio ---------- 21
2. Order of the Supreme Court of Ohio Denying Application for Rehearing ---------- 22
3. Objections of Complainant-Appellee Filed in the Supreme Court of Ohio ---------- 22
4. Opinion of the District Court on Motions to Dismiss ---------- 25
5. Opinion of the Probate Court ---------- 27
6. Opinion of the Court of Appeals ---------- 36
7. Opinion of the Supreme Court of Ohio ---------- 41

TABLE OF AUTHORITIES.

Cases.

Amalgamated Clothing Workers of America et al. v. Richman Brothers Co., 348 U. S. 511 (1955)..18, 19
American Ins. Co. v. Lester, 214 F. 2d 578 (C. A. 4, 1954) ..19, 20
Capital Service, Inc. et al. v. National Labor Relations Board, 347 U. S. 501 (1954)..19
Gray, In re Estate of, 162 Ohio St. 384 ..15
Miller, In re Estate of, 160 Ohio St. 529 ..14
Reckford's Will, In re, 307 N. Y. 165, 120 N. E. 2d 696 13
Stafford, In re Estate of, 146 Ohio St. 253..15
Von Kleist, In re Will of, 265 N. Y. 422, 193 N. E. 256 13

Constitutions.

Ohio Constitution, Article IV, Section 8 ..14
U. S. Constitution, Article XIV, Amendments, Section 1 ..2, 3, 4, 12, 14, 17

Statutes.

New York statutes, L. 1940, ch. 829, section 281-a of the New York Surrogate Court's Act ..13
Ohio General Code:
Sec. 10501-53 ..13, 14, 16
Secs. 10506-19 and 10506-20 ..16
Sec. 10509-185 ..15
Ohio Revised Code:
Sec. 2101.24 ..13, 14
Sec. 2109.05 ..16
Sec. 2113.58 ..15
Sec. 2505.32 ..10
28 U. S. C. 1257(3) ..2
28 U. S. C. 2283 ..18, 19
U. S. Judicial Code, Sec. 265 ..18, 19

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No. _____.

IN RE: ESTATE OF PATRICK SEXTON, DECEASED.

JAMES F. SEXTON,
Petitioner,

vs.

ELEANORE M. BARRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio (made final on May 4, 1955 by its order denying petitioner's application for rehearing) reversing the judgment of the Court of Appeals of the Seventh Judicial District of Ohio, which latter judgment in turn had reversed the judgment of the Probate Court entered in the cause.

OPINIONS BELOW.

The opinion of the Probate Court is unreported and is printed in Appendix 5 hereto, p. 27. The opinion of the Court of Appeals, Seventh Judicial District, printed in Appendix 6, p. 36, is unreported. The opinion of the Ohio Supreme Court is reported in 163 Ohio St. 124 and is printed in Appendix 7, p. 41. The opinion of the District Court is unreported and is printed in Appendix 4, p. 25.

JURISDICTION.

The judgment of the Ohio Supreme Court was entered on April 13, 1955. The petitioner seasonably filed an application for rehearing which was denied on May 4, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3). The federal question in the case was specifically and squarely raised in the immediate proceedings by the filing of a complaint in the United States District Court for the Northern District of Ohio, Eastern Division, charging therein a denial to this petitioner of his property without due process of law in a manner contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States of America* and seeking therein to restrain the Ohio Supreme Court from hearing the instant proceedings. In conjunction with the District Court action, the petitioner also made to the Ohio Supreme Court application for continuance of the instant proceedings pending a final disposition of the proceedings instituted in the District Court. Finally the petitioner formalized in the Ohio Supreme Court objections based on the District Court suit and the application for continuance. These objections are a part of the appendix and are printed in Appendix 3, p. 22.

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* Paragraph 2 of the District Court complaint reads in part as follows:

> "The action arises under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America. * * * The gravamen of this complaint is that the plaintiff has been denied his property without due process of law and without an equal protection of the law, as those guarantees are made by the Fourteenth Amendment. In this latter respect, the proceedings in the courts of the State of Ohio, to which reference shall be had hereafter are contained in * * * Case No. 34,079 in the records of the Supreme Court of the State of Ohio."

QUESTIONS PRESENTED.

1. Whether the Supreme Court of the State of Ohio erred in reversing the judgment of the Court of Appeals for the Seventh Judicial District of the State of Ohio.

2. Whether the Supreme Court of the State of Ohio decided the instant cause contrary to the property rights of the petitioner as those rights are guaranteed to the petitioner by the Fourteenth Amendment to the Constitution of the United States of America.

3. Whether the Supreme Court of the State of Ohio erred by deciding the instant cause at a time when the said Supreme Court was a defendant in litigation then pending against it and in which this petitioner was party together with said Supreme Court and Chief Justice thereof also being parties.

4. Whether the Supreme Court of the State of Ohio erred in failing on its own motion to disqualify five members of its Court as constituted at the time of this hearing.

5. Whether the Supreme Court of the State of Ohio erred in failing to award to this petitioner due process of law and equal protection of the law as those guarantees are made by the Fourteenth Amendment to the Constitution of the United States.

6. Whether the Supreme Court of the State of Ohio erred in deciding the instant cause pending the District Court proceedings and all appeals involved therein.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The U. S. Constitution, Article XIV, Amendments, Section 1, provides in part:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

The petitioner originally filed in the Court of Probate, Lake County, Ohio, a petition in discovery to effect a recovery from one Eleanore M. Barry, respondent herein, of moneys which this petitioner charged to belong to the Estate of Patrick Sexton, Deceased, in which estate this petitioner is a legatee. This action in discovery was heard by the Honorable J. Frank Pollock, Probate Judge for Lake County, Ohio, the county in which Patrick Sexton's last will and testament was recorded and probated, a county of which the respondent Eleanore M. Barry is also a resident, and a county of which this petitioner is not a resident.

The petition in discovery was filed on August 11, 1953. At that time, said Probate Judge seemed to have no doubt as to the present existence of a Patrick Sexton estate, as was true one month later through six days of trial. To the rather complete astonishment of this petitioner, two months after trial and three months after filing of suit, this same Probate Judge rendered on November 14, 1953, an opinion declaring the estate to be no longer in existence, and the decision was especially astounding inasmuch as

this same Probate Judge already had effected a few short months earlier through his Probate Court a transfer of the realty in the estate, a transfer which the petitioner here notes for later comment.

The jurisdictional decision which the Probate Court thus had rendered was immediately appealed to the Court of Appeals. This appeal was heard by the Court of Appeals for the Ohio Seventh Judicial District and a reversal was effected in that court. The respondent Eleanore M. Barry then appealed the reversal (journalized in the Court of Appeals on May 24, 1955) to the Ohio Supreme Court conditioned on allowance in the Ohio Supreme Court of a motion to certify. In the meantime, pursuant to the mandate of the Court of Appeals, fiduciary applications were heard by the Honorable J. Frank Pollock on June 9, 1954. At this hearing said Probate Judge dismissed one application outright and continued the other application, thus in effect denying a fiduciary to the estate pending the Ohio Supreme Court appeal. It was at this point that on June 14, 1954 an affidavit of bias and prejudice was filed against said Probate Judge. The appointment of a fiduciary was vital to the case, because by Ohio law a fiduciary can waive in the Ohio Supreme Court the printing of a record, thereby making in this case the 754 page Bill of Exceptions the record to be considered by the Ohio Supreme Court, and the denial of a fiduciary in violation of a mandate constituted under the circumstances herein outright prejudice, a prejudice which already was fortified by a course of conduct on the part of said Probate Judge.

By Ohio law, the hearing on an affidavit of prejudice is the responsibility of the Chief Justice of the Supreme Court of the State of Ohio, in this case the Honorable Carl V. Weygandt. This petitioner had no hearing in respect to his affidavit of prejudice. Instead he had correspond-

ence with the Chief Justice of the Ohio Supreme Court, the purpose of which was to induce the petitioner to withdraw his affidavit of prejudice thereby to permit Judge Pollock to resign and thereby to permit the assignment of an impartial Judge in the cause. To this end the correspondence further specifically provided that the journal entry of resignation was to be an entirely impartial one. However, after the affidavit of prejudice had been withdrawn in accordance with the intent of the correspondence, Judge Pollock thereupon deliberately disregarded the purpose of the correspondence, this being done by him through an endeavor in the journal entry of resignation to pass responsibility for his own biased incompetence onto the shoulders of this petitioner. On September 18, 1954, because of Judge Pollock's endeavor in this respect, an application was filed to revise the journal entry of resignation which Judge Pollock had entered in the cause, the effect of this application being to nullify the journal entry of resignation and a reinstatement of the affidavit of prejudice. Thereupon, instead of the Ohio Chief Justice's coming to Painesville to determine the prejudice, the Ohio Supreme Court on October 20, 1954 allowed the motion to certify. The petitioner then on December 17, 1954 instituted against the Ohio Supreme Court and others involved his District Court proceedings one of the purposes of which was to enjoin the Ohio Supreme Court from hearing the cause in view of the fiduciary denial. Parenthetically the mere fact of filing the District Court suit constituted an indication of this petitioner's complete lack of confidence in an upright decision by the Ohio Supreme Court, especially since the respondent already had filed a 20 page printed record (the Bill of Exceptions in the cause is 754 pages) in the Ohio Supreme Court, this 20 page record being definitely insufficient as to the issue of juris-

diction to be considered by the Ohio Supreme Court and one nevertheless which the Ohio Supreme Court was still ready to consider.

Service was had in the District Court proceedings on all of the defendants therein, these defendants being the respondent Eleanore M. Barry, Judge Pollock, the Court of Probate for Lake County, the Supreme Court of the State of Ohio, and Justice Weygandt. The respondent and the two Judge defendants filed motions to dismiss the action on two grounds: (1) That the petitioner could not invoke the jurisdiction of the District Court to secure an injunction against the courts of a State; and (2) that the petitioner had not on the face of the complaint been denied property without due process or equal protection of the law. The motions to dismiss were similar to a demurrer thereby admitting for purposes of decision the allegations of fact. However, the respondent Eleanore M. Barry apparently not appreciating fully the significance of the bias and prejudice even went so far in her brief in support of the motion to dismiss as to admit that Judge Pollock had entered a resignation in the case because he was biased and prejudiced in fact. After the petitioner had directed the attention of the District Court to the significance of this admission, the respondent by reply brief endeavored to withdraw the admission. Since the respondent had not obtained leave to file her reply, as was required by rule, the District Court returned the reply brief unfiled to her. The respondent thereafter never sought to obtain such leave because this would have accorded petitioner opportunity to answer.

After a studied consideration of the petitioner's complaint, and of the brief wherein the bias and prejudice was admitted, the Honorable District Court limited its decision to the injunction element of the action. Since the

complaint in the District Court sought only injunctive relief the District Court's view in that stage was that the complaint should be dismissed. The importance of this decision is that the Honorable District Court in thus limiting its decision to the injunction question thereby allowed the due process element of the case to remain open for purposes of future adjudication, *so that the District Court in effect has held that on the basis of facts charged this petitioner in the District Court has stated a cause of action under the due process clause of the Fourteenth Amendment to the Constitution of the United States of America.* This on the face of a complaint which incorporated therein the entire correspondence between this petitioner and the Ohio Chief Justice, a correspondence which in effect was evidence of collusion between the Ohio Chief Justice and the Probate Judge involved.

It was in this background that the Ohio Supreme Court decided half a case with the Ohio Chief Justice embroiled by his own signature sitting in on the decision. As if these circumstances weren't sufficient to arouse curiosity, the petitioner has since learned that the application for continuance forwarded to the Ohio Supreme Court for filing had never been filed and has been deliberately omitted from the record, thus making separate action necessary in order to get that and other parts of the record raising the constitutional question. This isn't even to mention the fact that the Ohio Supreme Court in its anxiety to cover up the case unloaded all of the papers back to the Court of Appeals and thence to Probate before it even decided the application for rehearing. After the filing of a praecipe in the Probate Court, on inquiry as to compliance therewith, the Probate Judge advised that he had written to the Ohio Chief Justice asking advice before they were sent back. The Ohio Chief Justice in

turn seems not to want this Court to review the application for continuance which was made in the Ohio Supreme Court.

As previously pointed out, the evidence in the case is in a 754 page Bill of Exceptions. The petitioner's grandfather had died in 1928. The will provided that the use and income from the property in his estate was to go to two daughters for life. Upon the death of the two life beneficiaries, the property itself was to pass to other of his children and to grandchildren as designated in the will. The survivor of the two life beneficiaries is now deceased, and pursuant to the will the instant proceedings were instituted to recover for the estate moneys in the respondent's possession. The evidence in the cause revealed two glaring frauds—one in 1930 and the other in 1937. The 1930 fraud involved the executrices' omitting from the inventory and accounting filed by them the balance on a note owing to the estate and the payment made on this balance. The 1937 fraud was the result of the respondent's acts as administratrix in the estate of the first of the two life beneficiaries to have died. In that year, as administratrix of that estate, the respondent through the misuse of her fiduciary powers in that year concealed the shortage already existing in designated trust accounts. The purpose of the concealment was to defeat in that year the remedy accorded to remaindermen by statute, a remedy which even the Ohio Supreme Court recognizes. After the respondent in 1937 had concealed the shortage, bank accounts which could have been used to cover the shortage were made joint and survivorship with the respondent, and this action involves particularly those joint bank accounts.

The evidence against the respondent became accumulative and conclusive. The respondent's own handwriting,

the documentary bank records, the respondent's contradictory testimony, the $1,800.00 deposit made by the respondent the Monday after the Saturday on which the life beneficiary had died, the respondent's conduct as administratrix of the estate of the first of the life beneficiaries to die, the fact that the respondent has now been in three courts not one of which has been able to say that the respondent even remotely is entitled to retain the moneys in her possession, plus the additional fact that even the Probate Judge in the case who had to resign preferred to revert to a jurisdictional dodge rather than face this Bill of Exceptions.

In the Ohio Supreme Court, in order to circumvent the 1930 and 1937 frauds, the respondent filed in the Ohio Supreme Court a printed record which omitted therefrom all evidence of the 1930 and 1937 frauds, both of which constituted two alternative grounds of decision in the Court of Appeals on the question of jurisdiction. Before this appeal had been perfected and the erroneous record filed, and subsequent the issuance of the mandate from the Court of Appeals to the Probate Court, the fiduciary applications had been introduced as heretofore discussed in the Probate Court. These fiduciary applications affected a substantial right in the Ohio Supreme Court, in respect to which see R. C. 2505.32, Ohio General Code, wherein it is provided that a fiduciary (who could have been joined to the suit) may waive in the Supreme Court of the State of Ohio the printing of a record. By the time these fiduciary applications were filed, there had begun to develop the course of conduct on the part of the Probate Judge as heretofore discussed, his denial of a fiduciary to the estate pending the Ohio Supreme Court appeal being representative of the climax to this course of conduct. Inasmuch as the effect of this conduct and the denial of a fiduciary

went to a substantial right in the Ohio Supreme Court, the allowance of the respondent Eleanore M. Barry's motion to certify and the filing by her of an inadequate record of necessity required the petitioner's proceeding into the District Court to gain an injunction to prevent the Ohio Supreme Court's hearing a case under circumstances entirely inadequate to the constitutionally guaranteed rights of the petitioner, particularly in view of what this petitioner could designate only as incredible conduct on the part of the Ohio Chief Justice in an improper use of his office.

When the Ohio Supreme Court decided the case, we have the anomaly of a court under suit deciding the very case which has placed it under suit. The inconsistencies of the Ohio Supreme Court's decision are many. The Ohio Supreme Court declares the life beneficiaries to be custodians of the moneys in their possession. The Ohio Supreme Court further declares that the life beneficiaries were not entitled to the principal or corpus of these moneys. The Ohio Supreme Court then declares that this petitioner, his brothers and sisters, his aunt, his uncle, the brothers and sisters of Eleanore M. Barry together with Eleanore M. Barry, are entitled to share the principal or corpus of these moneys. All of this is as the petitioner contended. But then the Ohio Supreme Court flaunts an Ohio Constitution and the law of trusts and proceeds to say that if the testator had required a bond there would in 1953 have been an estate. Since the testator didn't require bond, a fact which is entirely doubtful, the Ohio Supreme Court says that there can be in 1953 no estate. But the most significant anomaly in the case is in respect to the realty in the estate.

The surviving life beneficiary had died on February 21, 1953. Thereafter application was made to the Lake

County Probate Court for a transfer of the realty in the Patrick Sexton estate. This realty was transferred through the Probate Court of Judge J. Frank Pollock. Judge Pollock is aware of the transfer, as is the Ohio Supreme Court, a photostatic copy of the transfer having been incorporated into the District Court proceedings. The Ohio Supreme Court in effect in its decision recognizes the validity of this transfer by specifying in its decision the remaindermen who are to share in the realty. But that same Ohio Supreme Court has completely failed to explain how that same Probate Court can perfect title to realty and at the same time fail to have jurisdiction to do the same with respect to personalty. It was in this background that the petitioner charged in his District Court action a denial to him of his property without due process of law and without an equal protection of the law in a manner contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States of America. The decision of the Ohio Supreme Court in the cause merely confirms the validity of the charge.

The Ohio Supreme Court apparently appreciates the circumstances in which it finds itself. It carefully omits from its opinion any reference to the District Court suit. It has endeavored to obscure from its record and docket the fact of application for continuance, the fact of filing which can be proved because it was sent registered mail. In addition, the respondent herein even filed a memorandum brief opposing the continuance. In effect, the Ohio Supreme Court treated the federal question like a king or tyrant who considers his acts and decisions not a proper subject for review. The consequence is that the Ohio Supreme Court has not decided the federal question. It merely ignored it because it can't dispute the fact.

REASONS FOR ALLOWING THE WRIT.

A. THE SUPREME COURT'S DECISION.

1. Did the Supreme Court of the State of Ohio err in reversing the judgment of the Court of Appeals for the Seventh Judicial District of the State of Ohio?

2. Did the Supreme Court of the State of Ohio decide the instant cause contrary to the property rights of the petitioner as those rights are guaranteed to the petitioner by the Fourteenth Amendment to the Constitution of the United States of America?

The Ohio Supreme Court's decision is so erroneous that it constitutes a tragedy. Other than to ignore basic principle, the Ohio Supreme Court's own opinion contradicts itself. Under the circumstances of this case, it is to be closely scrutinized as being more than just an erroneous decision. According to the terms of Patrick Sexton's last will and testament, the two life beneficiaries were bequeathed "use and income" for life. The property itself was not theirs and this even the Ohio Supreme Court had to admit. That recognition in and of itself is admission of a trust over which by the provisions of Section 10501-53, subsection 4, Ohio General Code (Section 2101.24, Revised Code), the Probate Court has jurisdiction. In the further brilliance of its decision, the Ohio Supreme Court reverted to New York law. See *In re Will of Von Kleist*, 265 N. Y. 422, 193 N. E. 256, cited by the Ohio Supreme Court. However, *In re Reckford's Will*, 307 N. Y. 165, 120 N. E. 2d 696, is the New York interpretation of the *Von Kleist* case as applied to the instant proceedings. The *Reckford* case specifically states that the *Von Kleist* case involves a trust. See also the New York statutes, L. 1940, ch. 829, section 281-a of the New York Surrogate Court's Act. In the *Von Kleist* case, as is true also in the

instant Sexton case, where there is a trust, the Probate Court has jurisdiction. The Supreme Court of Ohio in effect recognizes the very trust that establishes Probate Court jurisdiction and then in the next breath denies the very jurisdiction which it already has admitted. Compare *In re Estate of Miller,* 160 Ohio St. 529, 542, and then reconcile, if at all possible, the instant Sexton decision. Also see Section 10501-53, subsection 3, Ohio General Code (Section 2101.24, Revised Code), pertaining to distribution of estate, not to mention Section 8 of Article IV of the Ohio Constitution, which reads as follows:

> "The Probate Court shall have jurisdiction *in probate and testamentary matters,* the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, * * * and such other jurisdiction in any county, or counties, as may be provided by law." (Emphasis added.)

The Ohio Supreme Court takes deliberate delight in its opinion as to what the record (and that means the printed record) does not contain. This the petitioner appreciates (and if the Ohio Supreme Court had read carefully the District Court complaint, it too would have appreciated it) because that is exactly why the petitioner filed his complaint in the District Court of the United States charging a violation of his rights under the Fourteenth Amendment. Other than for the simple fact that the Ohio Supreme Court itself says that its judgment can now be impeached in the District Court, there is a matter of two other frauds in this estate. The first was in 1930 when the executrices in the estate omitted from the inventory a note (referred to in these proceedings as the "Straub" note) owing to the estate and then further omitted from the accounting filed in the estate the pay-

ment on the balance of this note (the receipted note and the check in payment are in the 754 page Bill of Exceptions. They are not in the printed record). Then compare *In re Estate of Gray,* 162 Ohio St. 384, with *In re Estate of Stafford,* 146 Ohio St. 253, as respects the Cadillac automobile in the *Gray* case and the Straub note in the instant Sexton decision, and then note that in the *Gray* case there is no one year limitation. Further consider that the Ohio Supreme Court has withheld from the records to be reviewed by this Court the petitioner's application for continuance in the Ohio Supreme Court. If this combination isn't evidence of a denial of property without due process of law, then what is a denial, this with a suit already pending against that same court.

As to the 1937 fraud, the Ohio Supreme Court pretends to plead ignorance. The events of that year are very apparent. As the Ohio Supreme Court recognizes, and as the petitioner contended, the remaindermen had a remedy *in the Probate Court* under Section 10509-185, Ohio General Code (Section 2113.58, Revised Code), in the event of jeopardy to the fund. In 1937 the trust fund was in jeopardy and that the respondent Eleanore M. Barry knew. Her knowledge in this respect was a direct result of the respondent's fiduciary capacity in the Probate Court as the administratrix of the estate of the life beneficiary who had died in that year. In her fiduciary capacity as administratrix in that estate, the respondent closed out at the banks what the respondent knew were shorted trust accounts and then omitted them from her Probate Court accounting in a manner designed to conceal the shortage (this evidence is in the 754 page Bill of Exceptions. It is not in the 20 page printed record). This the petitioner contended, and the Ohio Court of Appeals in effect held, made the respondent a trustee of all moneys

subsequently acquired by the respondent as a result of the 1937 concealment. The applicable statute in this respect is Section 10501-53, and the question presented on this jurisdictional point in the Ohio Supreme Court is as follows:

> "The fourth and final question presented is whether a third person, with knowledge of the will and knowledge as to the exact nature of a trust, can upon the death of the first of two life beneficiaries conceal from the Probate Court through the perpetration of fraud the existence of a shortage in the trust accounts, so as to defeat the remedy accorded to remaindermen by Section 10509-185, now Section 2113.58, of the Ohio General Code, and thereafter acquire free and clear of Probate Court jurisdiction the assets of the estate from the life beneficiaries so as to defeat the rights of the residuary beneficiaries in and to these assets, or is that person a trustee in the Estate and subject as such to sub-section 4, Section 10501-53."

See also Sections 10506-19 and 10506-20, Ohio General Code, both now Section 2109.05, Revised Code. Note also that in Ohio the controlling statutes were enacted in 1932. Note further that the life beneficiaries had no power or right to invade or dissipate the principal or corpus assets.

As if these legal anomalies were not enough, the Ohio Supreme Court at page 131 of its opinion holds in effect that a testator by the mere expedient of providing that his executor or trustee shall serve without bond and sell real estate without the intervention of any court thereby deprives a Probate Court of jurisdiction. The exact import of this holding is that every last will and testament almost without exception grants to an executor these powers. The net result of the Sexton decision is that institution of suit in one of the larger counties in the State

against the Probate Court of that county could quickly and aptly prove just how the Ohio Supreme Court has played with a very valuable property right through the medium of an erroneous decision passing as opinion.

B. THE FOURTEENTH AMENDMENT—AN IMPARTIAL TRIBUNAL.

3. Did the Supreme Court of the State of Ohio err by deciding the instant cause at a time when the said Supreme Court was a defendant in litigation then pending against it and in which this petitioner was party together with said Supreme Court and Chief Justice thereof also being parties?

4. Did the Supreme Court of the State of Ohio err in failing on its own motion to disqualify five members of its Court as constituted at the time of hearing in its court?

5. Did the Supreme Court of the State of Ohio err in failing to award to this petitioner due process of law and equal protection of the law as those guarantees are made by the Fourteenth Amendment to the Constitution of the United States?

When the Ohio Supreme Court decided the instant cause, it was defendant in a United States District Court. These proceedings are now pending on appeal in the United States Court of Appeals. The circumstances of the case are unusual. The Probate Judge in the cause has been forced to enter a resignation through the filing of a prejudice affidavit. The complaint in the District Court was 29 pages and contained the entire correspondence between this petitioner and the Chief Justice of the Ohio Supreme Court. The allegation in the body of the complaint was collusion between the Probate Judge and the Ohio Chief Justice as evidenced by said correspondence. With the

Chief Justice's own signature, the District Court has allowed the due process element of the cause to remain open. Due process of law requires an impartial tribunal at every stage of the proceedings. It is evident that in this cause such was not so. This the Ohio Supreme Court knew. Nevertheless through the medium of a decision questionable to say the least, the Ohio Supreme Court by the interjection of "opinion" has decided a case erroneously.

C. THE DISTRICT COURT PROCEEDINGS.

6. Did the Supreme Court of the State of Ohio err in deciding the instant cause pending the District Court proceedings and all appeals involved therein?

The Honorable District Court dismissed the District Court action on the ground that Section 2283, Title 28, U. S. C., prohibited the issuance of an injunction against the courts of a State while the action was still pending in the State Courts. To sustain this result, the Honorable District Court based his decision upon cases decided under the former Section 265 of the Judicial Code. The District Court's opinion appears in Appendix 4, p. 25. However, the District Court rendered its decision prior to this Court's decision in *Amalgamated Clothing Workers of America et al. v. Richman Brothers Co.*, 348 U. S. 511 (1955). The District Court case is now pending in the Court of Appeals for the Sixth Circuit on the following questions and authorities, the District Court's decision being interpreted as a decision to the effect that a District Court is bound more closely by the old law until such time as the appellate courts interpret the new law. The questions and authorities which the petitioner is presenting in the Sixth Circuit are:

> Can a District Court of the United States issue an injunction against the Courts of a State during

the pendency of proceedings in the State Courts? The District Court said that the answer is "no." The appellant contends that under the new Section 2283, Title 28, the answer is "yes."

Amalgamated Clothing Workers of America et al. v. Richman Brothers Co., 348 U. S. 511 (1955);
Capital Service, Inc. et al. v. National Labor Relations Board, 347 U. S. 501 (1954);
American Ins. Co. v. Lester, 214 F. 2d 578 (C. A. 4, 1954).

Does the case law decided under former Section 265 of the Judicial Code apply to Title 28, Section 2283, as enacted in the year 1948? The District Court said that the answer is "yes." The appellant contends that the answer is "no."

Amalgamated Clothing Workers of America et al. v. Richman Brothers Co., 348 U. S. 511 (1955);
American Ins. Co. v. Lester, 214 F. 2d 578 (C. A. 4, 1954).

Do the cases decided under Title 28, Section 2283, and by the same token does Section 2283, allow an injunction in this instant action? The District Court bound itself by the prior case law. The appellant contends that on the basis of cases since decided under the new Title 28, Section 2283, the question must be answered "yes."

Amalgamated Clothing Workers of America et al. v. Richman Brothers Co., 348 U. S. 511 (1955);
Capital Service, Inc. et al. v. National Labor Relations Board, 347 U. S. 501 (1954);
American Ins. Co. v. Lester, 214 F. 2d 578 (C. A. 4, 1954).

The petitioner's position in the Court of Appeals for the Sixth Circuit is that the question of an injunction goes to the power and not to the jurisdiction of the District Court.

The consequence is that the District Court has jurisdiction because of the denial of property without due process of law. That being so, the power of injunction is necessary "in aid of its jurisdiction." So states *American Ins. Co. v. Lester,* 214 F. 2d 578 at page 582, and the petitioner respectfully submits that the Ohio Supreme Court had no right if it were an impartial tribunal to decide the instant cause until such time as the federal courts had answered the injunction question.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES F. SEXTON.

APPENDIX

APPENDIX 1.

Judgment of Supreme Court of the State of Ohio.

No. 34,079.

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS,
SEVENTH DISTRICT, LAKE COUNTY.

JAMES F. SEXTON,
Plaintiff-Appellee,

vs.

ELEANORE M. BARRY,
Defendant-Appellant.

Wednesday, April 13, 1955.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lake County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Probate Court be, and the same hereby is, affirmed.

It is further ordered and adjudged that appellant recover from appellee her costs expended in this Court and in the Court of Appeals taxed at $_____.

ORDERED, That a special mandate be sent to the Probate Court of Lake County, to carry this judgment into execution.

ORDERED, That a copy of this copy of this entry be certified to the Clerk of the Court of Appeals of Lake County, "for entry." (Journal No. 41, page 471.)

APPENDIX 2.

Order of the Supreme Court of Ohio Denying Application for Rehearing.

Wednesday, May 4, 1955.

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied. (Journal No. 41, page 495.)*

APPENDIX 3.

Objections of Complainant-Appellee Filed in the Supreme Court of Ohio.

The complainant-appellee interposes into these proceedings his objections to this Court's course of action in the instant proceedings pending a final disposition of the District Court proceedings, Case No. 31514, in the United States District Court for the Northern District of Ohio, Eastern Division, and all appeals that may be taken relative thereto. The complainant has charged in the District Court action a violation of the complainant's constitutional rights. These rights are paramount in these proceedings.

A motion to certify the record was allowed in the instant cause on October 20, 1954, and a rehearing on the motion was subsequently denied. Thereafter proceedings as above referred to were instituted in the United States

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* The Court of Appeals of Lake County entered judgment on May 6, 1955. Court of Appeals Journal 2, page 81.

District Court charging a denial to this complainant of due process of law by reason of a bias and prejudice on the part of the Probate Judge hearing these and corollary phases of the instant proceedings. The District Court proceedings were instituted on December 17, 1954 in the Northern District of Ohio, Eastern Division. Service was had in that action on all of the defendants therein named, and among the defendants therein were this Honorable Court and the Honorable Chief Justice. After institution of the District Court action, the complainant-appellee by motion forwarded to this Court on January 3, 1955 requested a continuance of this entire cause pending disposition of the District Court proceedings. The complainant subsequently on February 1, 1955 was advised that the instant proceedings had been set for hearing by this Court on March 2, 1955. In view of other events that have occurred in the process of this litigation, and which are described in the District Court complaint, the instant course of action in the mind of this complainant-appellee constitutes an event so incredible in fact that the complainant now for purposes of any review thereof as may become necessary interposes into the record of this Court his objection to this and other procedure.

The complainant-appellee particularly objects to a procedure that allows to lapse a period of some thirty days during which time the complainant has an application for continuance pending before the Court, then to learn that without having had notification as to a formal ruling upon this application the case has been set down for hearing. It is at this point that the complainant-appellee considers any action henceforth on the part of this Court as being within the purview of the due process clause of the United States Constitution.

As to the printed record filed by the defendant herein, the complainant-appellee points to the allegations of his District Court complaint, which allegations and complaint are incorporated herein by reference and made a part hereof. In view of the Straub note and also in view of the 1937 fraud perpetrated by the defendant, the inadequate nature of the printed record which the defendant has filed becomes most obvious, and this is true as to other circumstances surrounding the course of this litigation. As this Court is aware there is a 754 page Bill of Exceptions in these proceedings. The complainant-appellee stands on that Bill of Exceptions as the record required to be considered by this Court to determine the questions presented, as illustrated by the briefs of complainant and defendant filed in respect to the motion to certify, and this matter under the circumstances again is particularly within the purview of the due process clause of the United States Constitution.

Respectfully submitted,

JAMES F. SEXTON,

Attorney for the Complainant-Appellee.

APPENDIX 4.

Opinion of the District Court on Motions to Dismiss.

Civil Action No. 31514

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO,

EASTERN DIVISION.

JAMES F. SEXTON,
Plaintiff,

v.

ELEANORE M. BARRY, *et al.*,
Defendants.

McNAMEE, *District Judge.*

From plaintiff's Complaint it appears that as the result of a decision by the Probate Court of Lake County, Ohio, which was reversed by the Court of Appeals, there is now pending in the Supreme Court of Ohio case No. 34079, involving the issues between the plaintiff and defendants herein. In this action plaintiff seeks a temporary and permanent injunction restraining the Supreme Court of Ohio from hearing the above numbered case pending in that court. In addition, he also prays that this Court enter an order against some of the other defendants herein. He bases his claim for injunctive relief on the ground that he was denied due process of law in the State courts. The issue presented is governed by Section 2283 of Title 28 U. S. Code, which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In the recent case of *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 211 F. (2d) 449, the Sixth Circuit Court of Appeals held:

> "This section (2283) providing that a federal court may not grant an injunction to stay proceedings in the state court with certain exceptions, expresses the duty of 'hands off' by federal courts in the use of injunctions to stay litigation in the state court."

This is but a restatement of the rule laid down in many cases, including *Csatari v. General Finance Corp.*, C. A. Mich., 1949, 173 F. (2d) 798; *Essanay Film Mfg. Co. v. Kane*, 258 U. S. 358; *Toucey v. New York Life Ins. Co.*, 314 U. S. 118; *Mickey v. Kansas City*, 43 F. Supp. 739.

The motions of Barry, Pollock and Weygandt to dismiss the Complaint are sustained.

s/ CHARLES J. MCNAMEE,
Judge.

February 21, 1955.

APPENDIX 5.

Opinion of the Probate Court.

Docket 12 No. 16.

IN THE PROBATE COURT

STATE OF OHIO, LAKE COUNTY, SS.

In re: ESTATE OF PATRICK SEXTON, DECEASED.

OPINION.

This matter came on to be heard on the complaint of James F. Sexton, one of the heirs and legatees of Patrick Sexton, deceased, under the provisions of Section 10506-67 *et seq.* of the General Code charging that Eleanore M. Barry is in possession of assets belonging to the estate of Patrick Sexton, deceased, and was submitted on the evidence and briefs.

Patrick Sexton died testate on September 6, 1928, there being six children then surviving him. Under the terms of Patrick Sexton's last will and testament, there was created a life estate in two daughters, Ellen and Elizabeth. In creating this life estate, Patrick Sexton did not give either daughter any power or right to invade or dissipate the principal assets of the estate. Upon the death of either, all of said use and income was to go to the survivor of them until her death. Upon the death (provision also being made for marriage which did not occur) of the survivor of them, the residue of his property was to be "divided equally among my then living children, and the living children, if any, of any deceased child, the latter to take per stirpes and not per capita." The estate of Patrick Sexton was fully administered, the personal property delivered to Ellen and

Elizabeth Sexton pursuant to the terms of Patrick's will and a final account filed in this Court and approved.

It further appears from the evidence that Ellen and Elizabeth are now both deceased, Ellen having died in 1937 and Elizabeth in 1952 and that Eleanore M. Barry, the person charged with concealment, who is a granddaughter of Patrick, lived in the household of her aunts, Ellen and Elizabeth from the time of Patrick's death until their deaths. Complainant claims that the value of the personal property in Patrick's estate, some of which was not accounted for in his estate but which actually came into the possession of the two sisters was $19,571.78 although the accounting shows only $14,810.60. Apparently the sisters invaded the principal and no claim is made as to that but complainant does claim that Elizabeth the survivor with the connivance of Eleanore did either give to Eleanore or set up in joint bank accounts payable to the survivor of Elizabeth or Eleanore a sum said to be $11,332.06. The claim is that the entire personal estate of Patrick has now been dissipated but that Eleanore still has $11,332.06 of it and asks that she be found guilty of being in possession of moneys, goods, chattels, things in action, or effects of such estate and that appropriate relief be granted by this Court under the above sections.

Eleanore M. Barry who probably should be designated as the complainee but for convenience will be referred to as the defendant, denies any wrong on her part but places the emphasis of her defense on a question of law. This question in effect amounts to a demurrer as to the jurisdiction of this Court to adjudicate the issues of the case. Since the question is as to jurisdiction, the court deems it necessary to fully consider the question of law before giving attention to the facts in the case. Assuming for the sake of the discussion that the facts as claimed by the com-

plainant are true, can the court grant the relief sought under the provisions of the sections of law under which this complaint is filed?

Fundamentally the question is, can the court grant relief under sections 10506-67 *et seq.* in an estate which has been fully administered but in which a third person has secured possession of the assets bequeathed to legatees for life use only as against the remaindermen. The essential provisions of said statute are as follows:

> "Upon complaint made to the Probate Court or Common Pleas Court by a * * * legatee * * * or other person interested in the trust estate * * * against the fiduciary or any other person suspected of having concealed * * * or having been in the possession of any money * * * or effects *of such estate*, said court shall cite the person so suspected forthwith to appear before it to be examined, on oath, touching the matter of the complaint * * *."

The key to the problem lies in the proper construction of the words "of such estate." The defendant has thoroughly briefed her position that the estate was closed upon the approval of the final account in decedent's estate. Even though the account had been approved there might be a question as to whether the estate is closed if the estate of the decedent had not finally vested at the time of its distribution and many authorities were cited and analyzed to establish that the decedent's estate had finally vested upon its distribution.

The case of *Ratliff vs. Warner*, 32 O. S. 334 has many similarities and presents the same basic problem. There two daughters were left a life estate and the questions were: first, who was entitled to the remainder and second and of importance here, who should assert the rights of the parties claiming the remainder—they themselves or

the personal representative of the testator. The three syllabi in this estate are as follows:

> "1. In the absence of anything in the will to the contrary, it was the duty of the executor, upon the settlement of the estate, to make distribution as therein expressly directed, and such distribution was a proper and complete administration of his trust in relation to such bequest.
>
> 2. Whether the bequest over, on the death of Eliza without heirs of her body, is void, because inconsistent with the bequest to her and her heirs, or was valid. Quaere.
>
> 3. But if valid, they, and not the personal representatives of the testator, are the proper plaintiffs, to assert their rights, after final distribution of such bequest as directed by the will."

It appears to the Court that the argument of this case is that a bequest for life with remainder over vests in the legatees according to their respective interests immediately; that therefore the administration is completed; that therefore the heirs must assert their own rights rather than the executor and the implied analogy is that the Sexton estate being closed and the property vested in all parties, the remaindermen must pursue any remainder in the estate in the hands of a third party in a direct action against that party—they cannot pursue it through the closed estate.

The case of *Flickinger vs. Saum*, 40 O. S. 591 arrives at the same conclusion. Here there was a life estate in the widow with the remainder over to testator's grandchildren. The executor closed his estate, turned the property over to the widow and then later with misguided zeal assumed the power to sell the real estate and distribute the proceeds to the remaindermen. Syllabus 1 of this case reads in part as follows:

"A vested interest in remainder in such of the personalty as might be left, and a remainder in fee in the real estate (after the determination of the life estate of the widow) was vested immediately in the grandchildren as tenants in common. * * *"

The property vested and if the executor again assumed control of the property, he did it as an agent of the remaindermen. Again, the inference is that after the estate is closed that any action which may be necessary to protect the remaindermen is not through an action in the estate.

The following cases cited by the defendant further confirm the rule in Ohio that where the will provides for a life estate with remainder over, the estate vests at once in the remaindermen subject only to the life use of the life tenant, to-wit:

Everhard vs. Foreman, 31 O. O. 268; 75 O. App. 451;
Wilson vs. Wilson, 21 O. L. A. 137;
McKinney vs. McKinney, 8 O. O. 62.

This Court follows the law as above stated and holds that this estate vested in the remaindermen of Patrick Sexton subject only to the life use of Ellen and Elizabeth Sexton and that, they having died it is now completely vested in said remaindermen. This being true, can the Probate Court still grant relief to the remaindermen against a third person who is said to have possession of the personal property from said estate under the provisions of the sections in question?

In the case of *Johnson vs. Johnson,* 51 O. S. 446 the widow was given the life use with power to consume, and a man named Harbazal ingratiated himself with the widow and secured possession of the remainder in said estate. Here the remaindermen filed an action in Common Pleas

Court for discovery and accounting. The second and third syllabi of the *Johnson* case are as follows:

> "2. The widow under this will was, by implication, a quasi trustee for those in remainder, and the interest of the brothers and sisters of the testator, in the unconsumed property, was a vested right which could not be destroyed by the act of the widow in disposing of the property by gift to a third party, or otherwise than for her support or the benefit of the estate.
>
> "3. A third party acquiring said estate from her by gift or fraud, or by collusion with her, to the injury of the vested rights of those in remainder, and with knowledge of the will, holds the same, and the fruits thereof, as a trustee, for the remaindermen, and liable as such trustee, to account to them in equity." (Decided June 19, 1894.)

It appears that the complainant is attempting to do in this Court under this procedure what the Johnson heirs did in that case and the final question therefore is whether or not it can be done.

There are a number of decisions construing Sec. 10506-67 *et seq.* in which the scope of the operation of the sections is defined but in every case the issue was as to assets in a pending administration or guardianship.

In the case of *In re: Guardianship of Sanderson*, 17 O. O. 562; 64 O. App. 177, the ward created a trust prior to the appointment of a guardian and the guardian claimed that the trustee wrongfully withheld assets of the ward. In the opinion at page 564, the Court said:

> "* * * It is our opinion that the Legislature intended, in enacting these and allied sections of the Probate Code, to extend the jurisdiction of the Probate Court to matters closely connected with the administration of estates of deceased persons, guardians, and kindred matters, and that, in connection therewith, it was

intended that the Probate Court should be given the power to try questions of title to documents evidencing choses in action of the kind involved in this controversy, which power it did not have under decisions rendered prior to the amendment of the statutes. And it would seem that one of the primary purposes in amending the statutes in the adopted language was to accomplish this result.

"The statutes as amended contemplate something more than a summary proceeding; they provide for a trial of the issues as presented by the complaint, in accordance with the law governing trials, except in so far as modified by the express provisions of the Probate Code. * * *"

Again in *Goodrich vs. Anderson*, 17 O. O. 152; 136 O. S. 509, where a son gave his father notes for a debt and the father returned them unpaid six months before his death, the administrator brought an action under said sections to recover the notes. The Supreme Court held that the action was not properly brought even in this case. The syllabi of the case are as follows:

"1. The purpose of Sections 10506-67 to 10506-77, inclusive, General Code, relating to the proceedings to discover concealed or embezzled assets of an estate, is not to furnish a substitute for a civil action to recover judgment for money owing to an administrator or executor, but rather to provide a speedy and effective method for discovering assets belonging to the estate and to secure possession of them for the purpose of administration.

2. Where, in such proceeding, the defendant is found not guilty of concealing or embezzling assets of the estate of the decedent, the court may not proceed to determine other issues, but has no alternative except to dismiss the complaint."

Commentators express the opinion that the dissenting opinion of Judge Weygandt more nearly expresses the

intent of the legislature and it more nearly expresses the thinking of this Court. The following is the dissenting opinion in full:

"WEYGANDT, C.J. dissenting.

> The limitation imposed by the majority decision destroys the effect of the amended statutes by which the Legislature clearly expressed its intention to broaden greatly the jurisdiction of the Probate Court and thereby provide an effective, alternative remedy for the discovery and recovery of assets of an estate. It is difficult to imagine more comprehensive language than that found in the following jurisdictional excerpt from Section 10501-53, General Code:
>
> > The Probate Court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute.
>
> The majority opinion makes passing reference to this provision but significantly fails to point out a single statutory limitation thereon."

However, even in this dissent the court refers to the recovery of the *assets of an estate*. In the case before the Court there are no "assets of an estate." The estate has long since been closed and the assets at that time vested in the remaindermen. The purpose of the statute is to permit the fiduciary or one beneficially interested in the estate, even a creditor of an heir or legatee in bringing assets into the estate for the purpose of administration.

It might be said that the Probate Court has authority under Section 10501-53 quoted in the above dissenting opinion to accept jurisdiction in this case but again the court is limited in his plenary powers to matters *properly before the court*. After the title is passed to the devisees and legatees of a testator, the duty and power of the Probate Court are ended. The function of the Probate Court

is only to see that all of the assets of the deceased are collected, the decedent's obligations paid and the remaining assets properly distributed. From then on the property is vested in the distributees of the estate and is theirs the same as if acquired by purchase. Any invasion of their right of ownership cannot possibly be tried in the Probate Court because it was not given jurisdiction of such matters by law, from which the Probate Court derives its authority, being a statutory court.

The complaint is therefore dismissed at complainant's cost and exceptions are noted for the complainant.

J. FRANK POLLOCK,

Judge of the Probate Court.

November 14, 1953.

APPENDIX 6.

Opinion of the Court of Appeals.

Case No. 545.

IN THE COURT OF APPEALS

STATE OF OHIO, LAKE COUNTY,
SEVENTH DISTRICT.

IN RE: ESTATE OF PATRICK SEXTON, *Deceased.*

OPINION.

Dated: April 23, 1954.

PER CURIAM.

A petition for discovery of assets was filed in the Probate Court of Lake County by a legatee and devisee under the will of Patrick Sexton, Deceased, charging that Eleanor Barry was guilty of embezzlement and misappropriation and concealment of estate funds. Incidentally, Eleanor Barry is the executrix of the surviving life beneficiary.

Patrick Sexton died in 1928 and his will was duly admitted to probate and his estate administered in Lake County.

Two daughters were devised and bequeathed a life interest in the remainder of his estate after the payment of debts, and the executor distributed the personal estate to them and they receipted for the same as life beneficiaries.

The last surviving life beneficiary died on February 21, 1953.

There was both real and personal property in this estate, but this complaint is directed toward the personal

property only, the title to the realty remaining to this day in the name of Patrick Sexton.

At the time the will was probated Section 10509-185, General Code (Section 2113.58 R. S.), had not been enacted. This was an entirely new section of the code effective January 1, 1932. Prior to this time the remainderman in real property was protected by Section 10502-7 and Section 10503-23. This new section was for the protection of remaindermen's interest in personal property. When the distribution of the personal assets of Patrick Sexton Estate was made in 1930 delivery of this personal property was made to the beneficiaries entitled to the life use of this personal property.

It is apparent from the record that the beneficiaries of the life use of the personal property have spent or exhausted a very substantial part of the corpus of such assets. Both life beneficiaries are now deceased and Eleanor Barry is the executrix of the surviving life beneficiary. She is charged with concealing and embezzling the estate assets in this bill in discovery.

In its opinion the Probate Court states:

> "In the case before the court there are no 'assets of an estate.' The estate has long since been closed and the assets at that time vested in the remaindermen * * *. After the title is passed to the devisees and legatees of a testator, the duty and power of the probate court are ended. The function of the probate court is only to see that all the assets of the deceased are collected, the decedent's obligations paid and the remaining assets properly distributed. From then on the property is vested in the distributees of the estate and is theirs the same as if acquired by purchase. Any invasion of their right of ownership can not possibly be tried in the probate court because it was not given jurisdiction."

We must remember that when final account was filed there was in the record of this ate an outstanding remainder estate created by the testa and recognized by the probate court. The estate is still n notwithstanding the fact that a so-called final account s been filed. Now the life estate is terminated, and this tition for discovery of assets of the estate of Patrick ston was properly filed in the probate court in the c of the Estate of Patrick Sexton, Deceased. We beli that these assets whatever and wherever they may are assets of the Patrick Sexton Estate, and must be dministered in accordance with his will. The appli t is an interested party, has a right to be heard by the urt having charge of the administration of the Patrick S ton Estate, and the Probate Court was in error in dismis g the complaint.

General Code Section 10501-53 mong other things, provides:

> "The probate court shall have p nary power at law and in equity fully to dispose o ny matter properly before the court, unless the pow is expressly otherwise limited or denied by statut

Under the Constitution of 1852 d the laws enacted pursuant thereto the probate court h full power to order the carrying out of the provisions this will so as to protect the rights of the remainderm

> "The jurisdiction of the pro te courts of Ohio is conferred directly by Section 8, ticle IV of the Ohio Constitution, and by legislatio passed pursuant to the legislative authority granted that section of the Constitution, which legislation y expand but may not restrict or detract from th specific jurisdiction conferred by that section." In : Estate of Miller: Brandon, Appellant, v. The Ci National Bank and Trust Company, Executors, et a Appellees, 160 Ohio St. 529.

The cited case is definite authority for the jurisdiction of the probate court to determine the right of the petitioner for discovery of the assets of the estate of Patrick Sexton which now rightfully belong to the persons entitled thereto as remainder legatees under his will, so that such assets may be administered in accordance with the will.

We further refer to the cases of *In Re Estate of Gurnea*, 111 Ohio St. 715, and *In Re Estate of Stafford*, 146 Ohio St. 253, wherein on page 261 of the opinion we find:

> "In Ohio the jurisdiction of the Probate Court in testamentary matters and in the settlement of accounts of executors and administrators comes primarily from Section 8 of Article IV of the Constitution which provides:
>
> " 'The Probate Court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, * * * and such other jurisdiction, in any county, or counties, as may be provided by law.'
>
> "Section 10501-53, General Code, provides in part:
>
> " '* * * 3. To direct and control the conduct, and settle the accounts of executors and administrators, and order the distribution of estates: * * *.
>
> " 'The Probate Court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute.' "

In the case of *In Re Trust of Stuckey*, 80 Ohio App. 421 at 426, it is held: —

> "Section 10501-53, General Code, describes jurisdiction of the Probate Court, specifying thirteen separate situations in which such jurisdiction is granted."

The section concludes with the following statement:

" 'The Probate Court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute.'

"Of course the Probate Court had full power to order the carrying out of the provisions of this will so far as they affected the property in Madison County."

In Re Trust of Stuckey involved a similar question to that involved in this proceeding.

One of the provisions of the will in the instant case was that upon the death of the two daughters the residue shall be divided equally among my then living children, etc. These daughters had a life use and no more.

We hold that the Probate Court was vested with power to hear and determine the questions presented and the judgment is reversed and the cause remanded thereto for further proceedings according to law.

GRIFFITH, P.J., Concurs.
PHILLIPS, J., Concurs.
NICHOLS, J., Concurs.

APPENDIX 7.

Opinion of the Supreme Court of Ohio.

Proceeding to discover concealed or embezzled assets—Section 10506-67, General Code—Probate Court can give relief, when—Wills—Life estate in personal property created—Possession of residue to be delivered to those given life interests—Distribution of residue without requiring security—Personal property not thereafter part of estate.

1. No relief for a Probate Court estate, upon a complaint to the Probate Court pursuant to Section 10506-67, General Code, can be given except with respect to property of such estate.
2. Where a will expresses an intention that possession of the residue of the testator's personal estate should be delivered to those to whom he has given only life interests therein and does not provide for the taking of security therefor, such expressed intention may be given effect; and the executor under such will may lawfully distribute such residue to those having such life interests therein without requiring any security from them.
3. Where personal property is given by will to one for life with remainder over to another and where the will expresses an intention that the life tenant shall have possession and control of the personal property so bequeathed during his life and where the executor of the estate lawfully distributes such personal property to the life tenant and where no bond is ever required from the life tenant, such personal property or its proceeds will not thereafter be or, on the death of the life tenant, will it again become property of such estate.

(No. 34079—Decided April 13, 1955.)

APPEAL FROM THE COURT OF APPEALS FOR LAKE COUNTY.

In August 1953, complainant, claiming to act pursuant to Section 10506-67, General Code (Section 2109.50, Revised Code), filed in the Probate Court of Lake County a petition for discovery of assets in which it is alleged:

> "* * * that he is a devisee, legatee and heir of Patrick Sexton, deceased, that the last will and testament of said decedent was duly filed in the Probate Court of Lake County, Ohio, admitted to probate on the 5th day of November, 1928, * * * that the records in the probate of said decedent's estate evidences bank accounts and securities the disposition of which has never been accounted for in this court, that he has good cause to believe and does verily believe that Eleanore M. Barry * * * is in possession of money, goods, chattels, things in action or effects belonging to the estate of said decedent * * * the same being to the best of his knowledge and belief as follows:
>
> "1. The contents of a safety deposit box at The Cleveland Trust Company in the name of said Eleanore M. Barry, and in which Elizabeth Sexton, deceased, life tenant in said moneys and securities, kept and retained papers and other effects belonging to the estate of Patrick Sexton, deceased.
>
> "2. Bank accounts in the name of Eleanore M. Barry, carried at The Cleveland Trust Company and other banks, containing conveyances of money belonging to the estate of Patrick Sexton, deceased.
>
> "3. Chattels and other assets to which said Eleanore M. Barry claims title and which belong to the estate of Patrick Sexton, deceased."

The prayer of this petition is:

> "* * * that a writ of citation may be issued against said Eleanore M. Barry requiring her to appear before said court forthwith, then and there to be examined under oath touching the matters set forth in

said complaint, and that such other proceedings may be had in the premises as are authorized by law."

Section 10506-67, General Code, reads:

"Upon complaint made to the Probate Court or Common Pleas Court of any county by a fiduciary, creditor, devisee, legatee, heir or other person interested in the trust estate, or by the creditor of any devisee, legatee, heir, or other person interested in the trust estate, against the fiduciary or any other person suspected of having concealed, embezzled or conveyed away or of being or having been in the possession of any *moneys, goods, chattels, things in action, or effects of such estate,* said court shall cite the person so suspected forthwith to appear before it to be examined, on oath, touching the matter of the complaint. The Probate Court shall also have power to initiate proceedings on its own motion." (Emphasis added.)

The will of Patrick Sexton reads in part:

"3. I hereby give and bequeath to my two daughters, Ellen Sexton and Elizabeth Sexton, all of my household furniture and furnishings to be used by them in common while they shall reside together, and in the case of the death of either, to become the property of the survivor. In the event of the marriage of either or both, the same to be divided equally between them.

"4. I hereby give and bequeath to my two unmarried daughters, Ellen Sexton and Elizabeth Sexton, the use and income, in equal shares between them, of all the rest and residue of my property, real, personal and mixed, during their natural lives, and upon the death of either, all of said use and income shall go to the survivor of them until her death. Provided, however, that if either of my said daughters shall marry, the one remaining unmarried shall take all of said use and income until her death or marriage. When both

of my said daughters shall have married, or upon the death of the one that shall have remained unmarried, or if both remain unmarried, upon the death of the survivor of them, said rest and *residue* of my property *in whatever form it shall then be shall, if necessary, be converted into money, and divided equally among* my then living children, and the living children, if any, of any deceased child, the latter to take per stirpes and not per capita. And I hereby *give* to my said two unmarried daughters *so long as* they shall *share said use and income, and to* the *one* of them *to whom all of* said *use and income may accrue* under the provisions hereof, *full power and authority to convert* my real estate and personal property *into money without* the *intervention of any court,* and to execute and deliver to purchasers thereof any and all necessary deeds, bills of sale or other instruments of release and conveyance; with *full power to invest and reinvest* the proceeds in such manner as *to secure* the *best income possible* therefrom *consistent with* the *security of the principal,* and *to assign, release, satisfy and discharge* any and *all instruments evidencing such investments*; and any and all purchasers of my said property are hereby relieved from the obligation of seeing to the application of the proceeds thereof." (Emphasis added.)

In 1930, Ellen Sexton and Elizabeth Sexton as executrices of Patrick Sexton filed their first and final account disclosing a cash balance available for distribution of $9,979.35. With this account, they also filed the following receipt:

"Painesville, Ohio, March 31, 1930.

"Received of Ellen and Elizabeth Sexton, executrices of the estate of Patrick Sexton, the sum of nine thousand nine hundred seventy-nine and 35/100 dollars ($9,979.35), being the balance shown by the foregoing account; also United States liberty bonds

of the value of $3,450; also household goods and all other property devised to us and the survivors of us, by the will of said Patrick Sexton.

"Ellen Sexton
"Elizabeth Sexton"

The record does not disclose any occurrence in the Probate Court proceeding relative to the estate of Patrick Sexton from the time of approval of the final account of the executrices in 1930 until the filing of complainant's petition in 1953.

At the hearing before the Probate Court on complainant's petition, it appeared that Patrick Sexton's daughter Ellen had died in 1937 and his daughter Elizabeth had died in February 1953.

Complainant is one of three living children of a deceased son of Patrick Sexton. Defendant is one of five living children of another deceased son of Patrick Sexton. There are also two living children of Patrick Sexton entitled to share with complainant and defendant and their brothers and sisters as remaindermen, after the life estates of Ellen and Elizabeth provided for in the above-quoted paragraph 4 of the will of Patrick Sexton.

Defendant had lived with those two daughters of Patrick Sexton who had life interests under paragraph 4 of his will. It is the contention of complainant, and evidence was offered at the hearing in the Probate Court by complainant in an effort to prove, that defendant had in her possession and had acquired from these two daughters of Patrick Sexton all or substantially all the moneys which they had received from the estate of Patrick Sexton and with respect to which they had life interests pursuant to paragraph 4 of his will.

The Probate Court determined that relief could be given under Section 10506-67, General Code, only with

respect to property of the estate of Patrick Sexton; that, after the administration of the estate and distribution of the residue thereof to the life tenants in 1930 pursuant to paragraph 4 of the will, the property so distributed ceased to be property of the estate of Patrick Sexton; and that title to the property which had been so distributed to the life tenants was vested in the remaindermen on the death of the survivor of the life tenants. In view of these determinations, the Probate Court necessarily had to and did dismiss the complaint.

On appeal to the Court of Appeals, that court reversed the judgment of the Probate Court.

The cause is now before this court on appeal from the judgment of the Court of Appeals, pursuant to allowance of defendant's motion to certify the record.

Mr. James F. Sexton, in propria persona.

Miss Irene A. Lennon and *Mr. William M. Hubbard*, for appellant.

TAFT, J. At the outset, it may be observed that no relief can be given by the Probate Court under complainant's petition, except with respect to some property of the estate of Patrick Sexton, deceased. See emphasized portion in above quotation of Section 10506-67, General Code. See also Section 10506-73, General Code, and *In re Estate of Leiby*, 157 Ohio St., 374, 105 N. E. (2d), 583.

Therefore, in order to sustain complainant's contention that the Probate Court has jurisdiction to give some relief, we would have to decide that the personal property, for which a receipt was given to the executrices in 1930 by those entitled to life interests therein, either (1) could not lawfully have been distributed as it was by the executrices to themselves as those entitled to life interests

therein, or (2) remained at least in part property of the estate of Patrick Sexton even after distributed by the executrices to those entitled to life interests therein, or (3) again became property of the estate of Patrick Sexton, deceased, on the termination of those life interests therein.

It is arguable that words, such as those found in the first three sentences of paragraph 4 of Patrick Sexton's will, would require the executrices to hold the residue either as executrices or as trustees and pay only the income therefrom to themselves as life tenants, especially where such residue was composed entirely of money and negotiable bonds. See *In re Will of von Kleist*, 265 N. Y., 422, 193 N. E., 256; *Lapham v. Martin*, 33 Ohio St., 99, 104, 105; *Ratliff v. Warner*, 32 Ohio St., 334, 340, 342, 343. If so, they could not lawfully distribute that residue before the termination of the life interests therein. However, if, in his will, Patrick Sexton expressed an intention that possession of the residue should be given to the two daughters to whom he gave life interests therein, that expressed intention must be given effect. *Posegate v. South*, 46 Ohio St., 391, 21 N. E., 641; *In re Will of von Kleist, supra*; 33 American Jurisprudence, 708, Section 222; 3 Woerner's American Law of Administration (3 Ed.), 1557, Section 456.

In the fourth sentence of paragraph 4 of his will, Patrick Sexton gave to his two named daughters "so long as they shall share said use and income" and to the one of them, "to whom all of said use and income may accrue," the "full power and authority to convert" the residue of his estate "into money without the intervention of any court." The life beneficiaries could certainly not convert any part of the residue into money without having possession of the residue; and they could not so con-

vert it without the intervention of a court if, in doing so, they were acting as executrices or trustees under the supervision of the Probate Court. Further on in this sentence, the life beneficiary daughters are given "full power to invest and reinvest" the residue. This power would necessarily include a right to possession and control over the residue. Although there is a direction in the third sentence of paragraph 4 of the will for conversion into money at the end of the life interests, there is nothing in the language of the will which requires the executrices to make that conversion. See *Posegate v. South, supra, Flickinger v. Saum,* 40 Ohio St., 591, 600, 601; *Lapham v. Martin, supra,* 103. It certainly would not be necessary to have either an administrator or executor or a Probate Court trustee to arrange for such a conversion into money at the end of the life interests.

In our opinion, the language of paragraph 4 of the will clearly expresses an intention that possession of the residue should be delivered to Patrick Sexton's two daughters as life beneficiaries thereof. That being so, the money and liberty bonds, for which a receipt was given to the executrices, could lawfully be distributed by the executrices to themselves as those entitled to life interests therein. Furthermore, such distribution could lawfully be made without requiring security from the distributees. *Posegate v. South, supra,* 396; *In re Will of von Kleist, supra; Buckman's Trustee v. Ohio Valley Trust Co.,* 288 Ky., 114, 155 S. W. (2), 749, 138 A. L. R., 436. See annotations at 14 A. L. R., 1075, 101 A. L. R., 273, 138 A. L. R., 447; *Lapham v. Martin, supra; Lapham v. Martin,* 38 Ohio St., 538. Thus, in *Buckman's Trustee v. Ohio Valley Trust Co., supra,* it is stated:

> "* * * where the life tenant is given the possession and use of the property, it is not incumbent upon

the executor to require a bond of him. The remainderman, or someone representing him, may step in, however, and require the execution of a bond, if the life tenant shows a disposition to waste or destroy the property."

When such distribution was made, the property so lawfully distributed would thereupon cease to be either property of the estate of Patrick Sexton or subject to any further administration as a part of that estate. *Flickinger v. Saum, supra; Ratliff v. Warner, supra; Langley v. Farmington,* 66 N. H., 431, 27 A., 224, 49 Am. St. Rep., 624; 3 Woerner's American Law of Administration (3 Ed.), 1554, 1557, Sections 454, 456.

Thus in *Posegate v. South, supra,* after a determination that the words of the will expressed an intention that the life tenant was to have possession of the personal property with respect to which she had been given a life estate, it was said in the court's opinion at page 396:

"It may be, that a court of equity, would have compelled the widow to furnish the legatees of the remainder, an inventory of the property received by her from the executor [see annotation, 45 A. L. R., 519]; and, that a proceeding might have been maintained by them against her to require security against its improper disposition, likely to defeat their estate in it. * * * But we are of opinion, no duty was imposed upon the executor, to exact an inventory from the widow when he delivered the personal estate to her according to the requirement of the will, or to institute proceedings to protect the donees in remainder; nor, is he responsible for any disposition made of the property by the widow after it lawfully came to her possession, or thereafter accountable for it, in his representative capacity. It cannot be claimed, that any express duty is enjoined by the will upon the executor, with respect to the estate in re-

mainder. He is not required or directed to take charge of the unconsumed personalty, and divide it among the children. It is given by the will directly to them, to be equally divided among them."

In the opinion by Lehman, *J.*, in *In re Will of von Kleist, supra,* it is stated:

"When the testator bequeathed to his children the usufruct of his property with remainder to their issue, it is clear that he intended that the remaindermen should have the right to hold the custodian of the property responsible for the property when the time comes for delivery to them. Where a testator indicates that possession of a fund should be delivered to a life tenant, the life tenant becomes substituted as custodian for the executor and is alone accountable for its payment to the remainderman."

In *Langley v. Farmington, supra,* it is said in the opinion:

"If she had given a bond as executrix * * * The bond would not have protected the remaindermen against the unauthorized, negligent, or fraudulent use or disposal of the property while in her possession as life tenant, for the executrix would not be responsible to the remaindermen for the preservation of the property after it passed into the possession of the life tenant."

As complainant points out, the case of *Ratliff v. Warner, supra,* involved a bequest of personalty in absolute terms with a limitation over on a contingency and did not involve a bequest of personalty to one for life with remainder to another; and there are statements in the opinion in that case which indicate that generally, where there is a life estate or life use given with respect to money with a remainder after such life estate to others, then the exec-

utor does have a duty to protect the interests of the remaindermen, either by holding the principal until the termination of the life estate or by taking security for it from the life tenant. There are similar statements in the opinions in *Lapham v. Martin, supra,* and *Schwartz v. Gehring,* 7 C. C., 426, 4 C. D., 662. This general rule may also be applied with respect to a bequest of a residue of a testator's personal estate to one for life with remainder to another, because the protection of the remainderman against depreciation in value of the personal property will generally require the conversion of the personal property into money. Consequently, in effect, a bequest of money will result from such a bequest of the residue of a personal estate. With respect to this general rule, it is said in 3 Woerner's American Law of Administration (3 Ed.), 1557, Section 456:

> "If * * * it is fairly inferable from the will, construed under the ordinary rules, that, in bequeathing the residue of his personal estate to one for life with remainder to another, he did not mean to deprive the life tenant of the specific possession and use of the property bequeathed, such life tenant is entitled to all such property in specie; and the same rule applies to a general residuary bequest for life with remainder over."

That this would be a correct statement of the law of Ohio is apparent from an examination of the reasons advanced in the opinions for the decisions rendered in the subsequent cases of *Flickinger v. Saum, supra,* and *Posegate v. South, supra.*

Complainant argues further that those two cases are distinguishable from the instant case because the life tenant in each of them had a power to consume the principal assets and the life tenants in the instant case had no such

power. As a reading of the opinions i
disclose, the only significance, with
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In support of his contention with respect to the jurisdiction of the Probate Court, complainant relies upon the following provisions of Section 10501-53, General Code (Section 2101.24, Revised Code):

> "Except as hereinafter provided, the Probate Court shall have jurisdiction:
>
> "* * *
>
> "3. To direct and control the conduct, and settle the accounts of executors and administrators, and order the distribution of estates;
>
> "4. To appoint and remove guardians and testamentary trustees, direct and control their conduct, and settle their accounts;
>
> "* * *
>
> "13. To direct and control the conduct of fiduciaries and settle their accounts.
>
> "Such jurisdiction shall be exclusive in the Probate Court unless otherwise provided by law.
>
> "The Probate Court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute."

With respect to the paragraph numbered three of this statutory section, it may be observed that the Probate Court completed its direction and control of the conduct and settlement of the accounts of the executrices and approved their reported distribution in 1930, about 23 years before the filing of complainant's petition in the instant case. As hereinbefore pointed out, that distribution terminated any rights of the estate in or to the property so distributed. In view of the nonexistence since 1930 of any

executors or administrators in the Patrick Sexton estate, this part of the statute can have no possible application in the instant case.

With respect to paragraph 4 of Section 10501-53, it is conceded that the Probate Court has never appointed a guardian or testamentary trustees with respect to the Patrick Sexton estate. By the words of this paragraph, it is apparent that the Probate Court's right to direct and control the conduct of trustees and settle their accounts relates only to trustees which it has appointed. With respect to the paragraph numbered 13, there is no one in the instant case who comes within the statutory definition of "fiduciary" (Section 10506-1, General Code [Section 2109.01, Revised Code]), so that that paragraph can have no application.

As to the "plenary power" provisions of Section 10501-53, General Code, there must first be some "matter properly before the court" before its words can be applicable. In the instant case, we have an estate in which the executrices filed a final account and report of distribution which was approved 23 years before complainant filed his petition; and the complainant's petition relates to property as to which the estate has no title or right to possession. There is therefore no longer any matter properly pending before the Probate Court which might bring the "plenary power" provisions of Section 10501-53, General Code, into operation.

Complainant refers to *Johnson v. Johnson*, 51 Ohio St., 446, 38 N. E., 61, and especially to that part of paragraph two of the syllabus referring to a life tenant of personal property under a will as "a quasi trustee for those in remainder." See also annotation at 137 A. L. R., 1054. As that case holds, one who receives possession of personal property as life tenant under a will, as well as one to whom

he wrongfully transfers such personal property, may be subject to obligations to remaindermen. But it is significant that such obligations in the *Johnson* case were enforced by proceedings instituted by the remaindermen in the Common Pleas Court—not by any proceedings instituted in the Probate Court.

Complainant argues that the Probate Court had jurisdiction pursuant to the provisions of Section 10506-40, General Code (Section 2109.35, Revised Code), and Section 10509-185, General Code (Section 2113.58, Revised Code), by reason of a fraud perpetrated upon the Probate Court in 1930 by the executrices and by reason of a fraud perpetrated upon the Probate Court in 1937 by defendant.

Section 10506-40, General Code, reads in part:

> "The order of the court upon the settlement of an account shall have the force and effect of a judgment. Such order may be vacated only as follows:
>
> "(a) Such order may be vacated for fraud, upon motion of any person affected thereby, or upon order of the court at its own instance, if such motion is filed or order is made within one year after discovery of the existence of the fraud."

Our attention has not been called to any such motion or order. Cf. *In re Estate of Stafford,* 146 Ohio St., 253, 65 N. E. (2d), 701, decided under a form of that statutory section not containing such a requirement with respect to a motion or order or such a limitation with respect to the time of such a motion or order. It would appear, therefore, that the 1930 settlement of the final account of the executrices in the instant case still has the "force and effect of a judgment." As hereinbefore pointed out, the Patrick Sexton estate was closed and its assets lawfully and completely distributed in 1930. We do not see, therefore, how defend-

ant could perpetrate a fraud upon the Probate Court in 1937 with respect to that estate.

Although it was not enacted until 1932, complainant argues that Section 10509-185, General Code, indicates a legislative intent that the Probate Court was to have continuing jurisdiction with respect to property delivered to a life tenant. That section reads:

> "When by a last will and testament the use or income of personal property is given to a person for a term of years or for life, and some other person has an interest in such property as remainderman, the court, unless such last will and testament otherwise provides, shall have authority to deliver such personal property to the person having the limited estate, with or without bond, as the court may determine; or the court may in its discretion order that such property be held by the executor or some other trustee, with or without bond, for the benefit of the person having the limited estate. If bond is required of the person having the limited estate, or of the trustee, it may be increased or decreased, and if bond is not required in the first instance it may be required, at any time prior to the termination of the limited estate, at the discretion of the court."

Even if we assume that this statutory section could have been applied with respect to the Patrick Sexton estate notwithstanding the time of its enactment, we believe that the time for such application has passed. In the instant case, after the delivery of the personal property in 1930 to those having life interests therein, the only thing which this statute authorized the Probate Court to do with respect to that personal property was to require a bond and, by the words of the statute, this could only be required "prior to the termination of the limited estate." The limited estate has terminated and no bond was ever required.

Our conclusion is that the Probate Court properly dismissed this proceeding. The judgment of the Court of Appeals is, therefore, reversed, and that of the Probate Court affirmed.

Judgment reversed.

WEYGANDT, C. J., MATTHIAS, HART, ZIMMERMAN, STEWART and BELL, JJ., concur.

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HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 228.

IN RE: ESTATE OF PATRICK SEXTON, DECEASED.

JAMES F. SEXTON,
Petitioner,

vs.

ELEANORE M. BARRY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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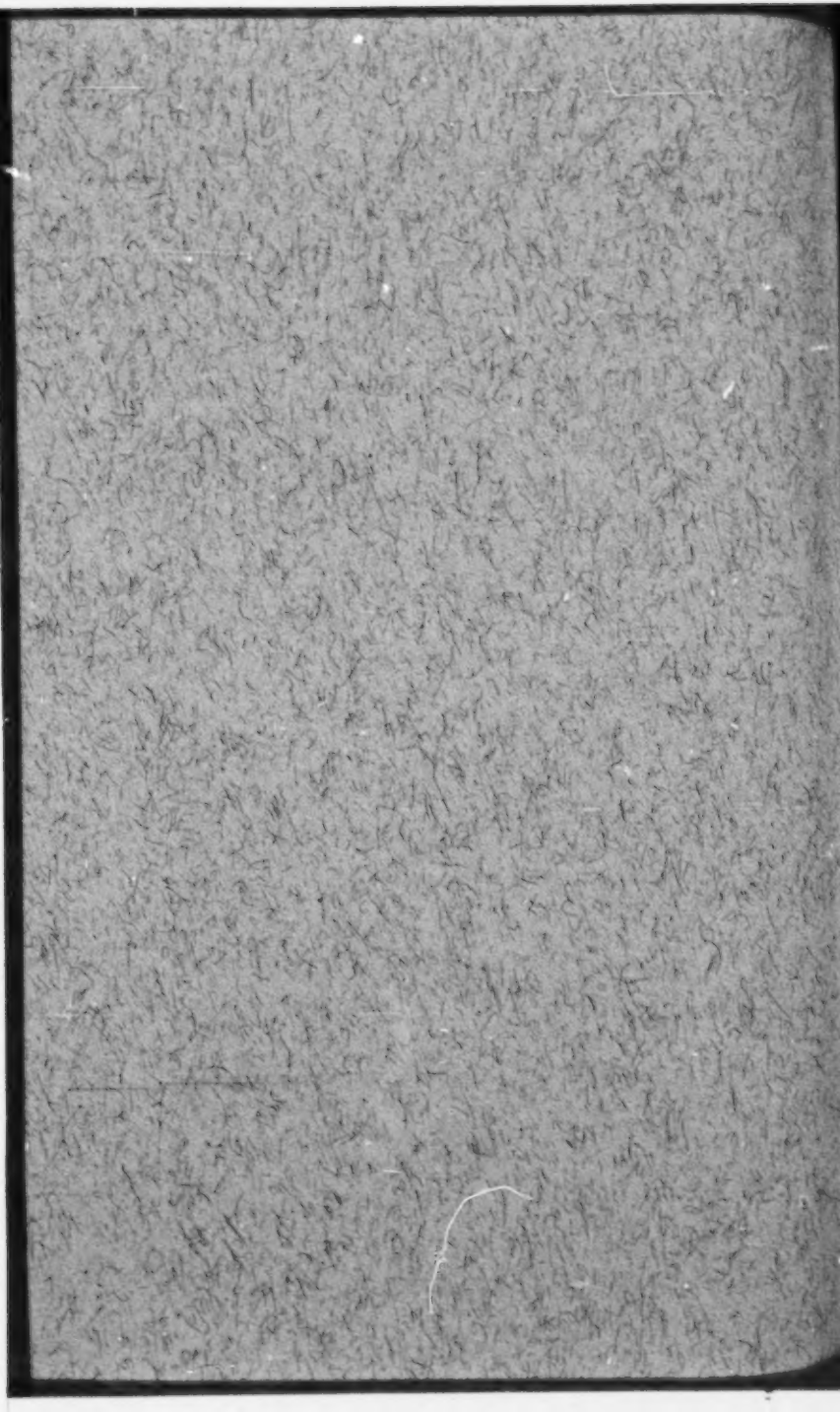


TABLE OF CONTENTS.

Questions Presented ---------- 1

Statement ---------- 2

Argument Against Granting the Writ ---------- 3

I. The Federal Question Now Sought to Be Raised by Petitioner Was Not Timely and Properly Raised Below ---------- 3

II. The Petition Does Not Comply With Rule 23 and Should Therefore Be Denied ---------- 4

III. There Are No Special and Important Reasons for Granting Certiorari; Petitioner Has Failed to Invoke the Proper and Established Remedy Available Under Ohio Law, and There Has Been No Adjudication on the Merits of His Claim---- 5

Conclusion ---------- 7

TABLE OF AUTHORITIES.

Cases.

Consolidated Turnpike Co. v. Norfolk & Ocean View R. Co., 228 U. S. 596 (1913) ---------- 6

Copperweld Steel Co. v. Industrial Commission of Ohio, 324 U. S. 780 (1945) ---------- 6

Edelman v. California, 344 U. S. 357 (1953) ---------- 6

Flickinger v. Saum, 40 Oh. St. 591 (1884) ---------- 6

Johnson v. Johnson, 51 Oh. St. 446, 38 N. E. 61 (1894) ---------- 3, 6

Lynch v. New York, 293 U. S. 52 (1934) ---------- 4

McCoy v. Shaw, 277 U. S. 302 (1928)---------- 6

McGarrity v. Delaware River Bridge Commission, 292 U. S. 19 (1934) ---------- 4

Memphis Gas Co. v. Beeler, 315 U. S. 649 (1942) -- 4
Michigan Sugar Co. v. Michigan, 185 U. S. 112 (1902) 4
Posegate v. South, 46 Oh. St. 391, 21 N. E. 641 (1889) 6
Ratliff v. Warner, 32 Oh. St. 334 (1877) ---------- 6
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U. S. 70 (1955) ---------- 6
Woods v. Nierstheimer, 328 U. S. 211 (1946) ------ 6

Statute.

Ohio Revised Code, Section 2505.32 ---------- 5

Rules of Practice.

Rules of the Supreme Court of the United States:
Rule 19 ---------- 2
Rule 23 (1) (e) and (f) ---------- 1
Rule 23 (4) ---------- 1, 4

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

I.

Whether the alleged federal question was timely and properly raised in the proceedings below so as to give this Court jurisdiction to review the judgment on certiorari.

II.

Whether petitioner has complied with Rule 23 (1) (e) and (f) and 23 (4) of this Court.

III.

Whether petitioner has made the showing of special and important reasons for the granting of a writ of certiorari required by Rule 19 of the Rules of this Court where petitioner has failed to invoke the proper and established remedy available under state law and there has been no adjudication on the merits of his claim.

STATEMENT.

In 1953 petitioner filed in the Probate Court of Lake County, Ohio, a complaint seeking to initiate discovery proceedings concerning certain alleged assets of the estate of one Patrick Sexton who died testate in 1928 (Printed Record in the Supreme Court of Ohio, hereinafter cited "R.," 1, 2), the residue of which estate had been distributed to certain life tenants in 1930 (R. 11). Petitioner sought to compel respondent to appear before the Probate Court and be examined with respect to this matter (R. 2).

The Probate Court determined that it had no jurisdiction of the subject matter since the estate of the decedent Patrick Sexton had ceased to exist upon the distribution of the residue thereof to the life tenants in 1930, at which time title to the property so distributed vested in the remaindermen, subject to the life tenancies (Petitioner's Appendix 5, p. 27 of Petition for Writ of Certiorari, hereinafter cited "Appendix").

Upon appeal to the Court of Appeals of the Seventh Judicial District of Ohio, the judgment of the Probate Court was reversed (R. 19, 20). Respondent moved to certify the record to the Supreme Court of Ohio. The motion was granted.

Thereafter, in April 1955, the Supreme Court of Ohio by unanimous vote of the Court reversed the Court of Appeals, affirmed the action of the Probate Court, and

directed the dismissal of the proceedings on the ground that under the laws of Ohio, the Probate Court had no jurisdiction of the subject matter (163 Oh. St. 124, 126 N. E. 2d 129, Appendices 1 and 7). The Court pointed out (163 Oh. St. at 137-138, 126 N. E. 2d at 136-137, Appendix 7, pp. 54, 55) that the obligations of a life tenant, or of one to whom he wrongfully transfers personal property, to remaindermen in that property, are enforceable in Ohio by proceedings instituted in the Common Pleas Court, not in the Probate Court, citing *Johnson v. Johnson,* 51 Oh. St. 446, 38 N. E. 61 (1894).

Petitioner has never sought to invoke the jurisdiction of a proper forum; he has not brought any action against respondent in a Common Pleas Court. His claim has therefore never been adjudicated on the merits.

ARGUMENT AGAINST GRANTING THE WRIT.

I.

The Federal Question Now Sought to Be Raised by Petitioner Was Not Timely and Properly Raised Below.

Petitioner claims (Petition, p. 2) to have raised the federal question in the case by filing a complaint in the United States District Court for the Northern District of Ohio, Eastern Division, seeking therein to restrain the Ohio Supreme Court from hearing the instant proceedings. Palpably this did not raise any federal question in the proceedings then pending before the Ohio Supreme Court.

Petitioner further asserts (Petition, p. 2) that "In conjunction with the District Court action, the petitioner also made to the Ohio Supreme Court application for continuance of the instant proceedings pending a final disposition of the proceedings instituted in the District Court." No such application for continuance is contained in the in-

stant record and the grounds therefor do not appear. Moreover the Supreme Court of Ohio did not hear argument on or decide the instant case until the said District Court proceedings had been dismissed.

Finally petitioner claims to have raised a federal question in the Ohio Supreme Court by filing so-called "Objections" (Appendix 3). This document made no complaint of any conduct of the Supreme Court of Ohio abridging the privileges or immunities of petitioner or denying him due process of law or equal protection of the laws. It made no challenge to the qualifications of the Supreme Court of Ohio or of any member thereof to hear and decide the instant case. It requested no relief on the basis of the objections made. Such a document was inadequate to raise any constitutional question. *Michigan Sugar Co. v. Michigan*, 185 U. S. 112 (1902).

Failure of petitioner to have raised in timely and proper fashion the federal question now urged is in itself basis for the denial of the writ of certiorari. *Memphis Gas Co. v. Beeler*, 315 U. S. 649 (1942); *Lynch v. New York*, 293 U. S. 52 (1934); *McGarrity v. Delaware River Bridge Commission*, 292 U. S. 19 (1934).

II.

The Petition Does Not Comply With Rule 23 and Should Therefore Be Denied.

The petition for writ of certiorari does not contain a concise statement of the case, nor does it anywhere present "with accuracy, brevity, and clearness" the matters essential to an understanding of the points requiring consideration (Rule 23 (4)). It is replete with references to immaterial events unsubstantiated by the record in this case. In many instances petitioner substitutes his unwar-

ranted conclusions, inferences and deductions for statements of fact.[1]

The statements made by petitioner with respect to an injunction action brought by petitioner against the Supreme Court of Ohio and others in the United States District Court are unsupported by the instant record, relate to an independent action not presently before the Court, and in any event are irrelevant in view of the final dismissal of that action by the District Court on February 21, 1955 (Appendix 4) prior to the argument and decision of the instant case in the Supreme Court of Ohio.

III.

There Are No Special and Important Reasons for Granting Certiorari; Petitioner Has Failed to Invoke the Proper and Established Remedy Available Under Ohio Law, and There Has Been No Adjudication on the Merits of His Claim.

The decision of the Supreme Court of Ohio sought to be reviewed by this petition affirmed a dismissal of a complaint filed in the Probate Court of Lake County, Ohio, on the express ground of lack of jurisdiction of that Court. The Supreme Court of Ohio, without regard to the merits of petitioner's claim, has applied the established law of Ohio that upon final distribution of a personal estate to life tenants, title vests in the remaindermen, the property is no longer property of an estate, and the Probate Court has no jurisdiction in an action concerning such property.

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[1] E.g., petitioner says that "* * * by Ohio law a fiduciary can waive in the Ohio Supreme Court the printing of a record * * *." (Petition, p. 5.) This is a reference to the second paragraph of Ohio Revised Code Section 2505.32. That section was not available to petitioner for it applies only when the fiduciary is the appellant whereas petitioner was the appellee in the Supreme Court of Ohio.

Flickinger v. Saum, 40 Oh. St. 591 (1884); *Ratliff v. Warner*, 32 Oh. St. 334 (1877); *Posegate v. South*, 46 Oh. St. 391, 21 N. E. 641 (1889).

The opinion cited with approval *Johnson v. Johnson*, 51 Oh. St. 446, 38 N. E. 61 (1894), which recognized a remedy by action in the Common Pleas Court by a remainderman against a life tenant or one wrongfully receiving property from a life tenant (163 Oh. St. at 137-138, 126 N. E. 2d at 136-137, Appendix 7, pp. 54, 55).

Thus the Court, in effect, pointed out the proper remedy available to petitioner—a remedy which is in no way foreclosed or prejudiced by the judgment which he now asks this Court to review.

No substantial federal question is presented since petitioner is not without remedy if entitled to redress. He has available to him a forum within which properly to assert any claim he may have. *Copperweld Steel Co. v. Industrial Commission of Ohio*, 324 U. S. 780 (1945); *McCoy v. Shaw*, 277 U. S. 302 (1928); *Woods v. Nierstheimer*, 328 U. S. 211 (1946).

The "Objections" of petitioner in the Ohio Supreme Court merely criticized certain procedural steps taken in the course of the proceedings below. A claim of lack of due process on this account is so trivial as to be completely frivolous. *Consolidated Turnpike Co. v. Norfolk & Ocean View R. Co.*, 228 U. S. 596 (1913). Even if it were not frivolous the procedure under the circumstances of this case raises no substantial federal question. *Edelman v. California*, 344 U. S. 357 (1953); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70 (1955).

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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SEP 16 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 228.

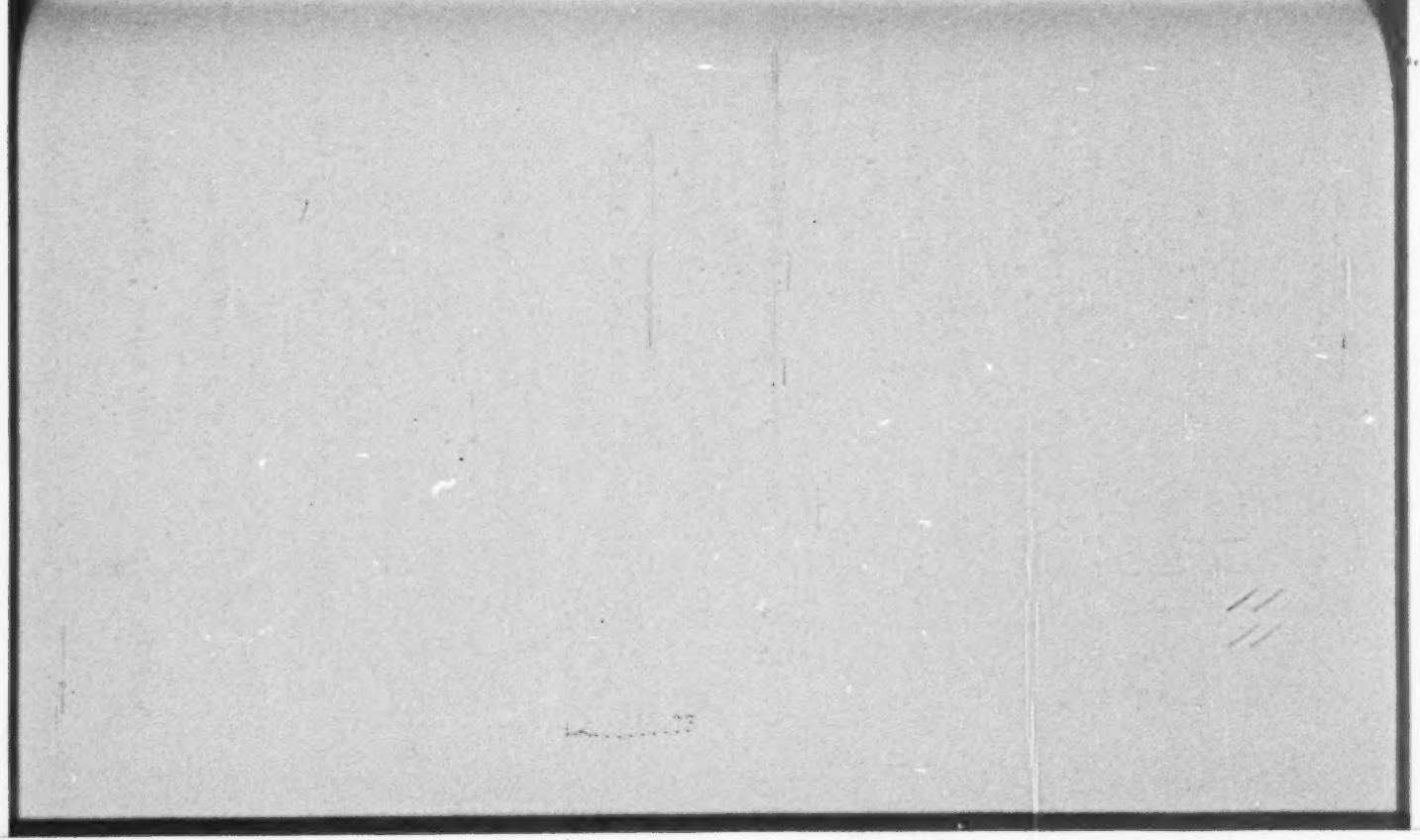
IN RE: ESTATE OF PATRICK SEXTON, DECEASED.

JAMES F. SEXTON,
Petitioner,
vs.
ELEANORE M. BARRY,
Respondent.

REPLY BRIEF OF PETITIONER.

JAMES F. SEXTON,
543 E. 108th Street, Cleveland 8, Ohio,
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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9847



In the Supreme Court of the United States

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REPLY BRIEF OF PETITIONER.

1. Respondent now argues that the petition herein does not conform with the requirements of Rules 21(1)(e) and 21(4) of this Court. With that contention the petitioner respectfully disagrees. The petition is quite clear that the Ohio Supreme Court was a party to litigation pending in the District Court of the United States and now pending in the Circuit Court of Appeals for the Sixth Circuit. The petition is also quite clear that on the basis of the complaint filed in the District Court, the District Court has rendered a decision holding in effect that the petitioner on the face of that complaint has stated a cause of action within the meaning of the due process clause of the Fourteenth Amendment. Under these circumstances, the petitioner urges to this Court that the Ohio Supreme Court should have awaited the outcome of the federal action through a continuance of the instant cause.

2. Respondent also argues that there are not present in the instant cause those special considerations which are

required pursuant to Rule 19 of this Court. Again the petitioner respectfully disagrees. In the first instance, the Probate Judge originally deciding this cause since has been compelled through the medium of an affidavit of bias and prejudice to enter a journal entry of disqualification. That circumstance alone requires a close scrutiny of the instant case. In the second place, the petitioner has filed a complaint in a United States District Court, which complaint by reference is a part of the record in this cause, the reference incorporation having been made in the objections referred to herein, with the District Court holding in effect that on the face of this complaint there has been a denial of property without due process of law. Until that case had been finally decided, and it was not finally decided until all appeals had been prosecuted, the Ohio Supreme Court as it was constituted at the time of this hearing had a direct interest in the outcome of this litigation, and this becomes particularly so considering that the District Court action had been predicated upon the fact of the petitioner's already having been denied his property without due process of law through the Ohio Supreme Court's original allowance of the motion to certify.* The same is true of the Ohio Chief Justice, also a party in the District Court action, because he had more of an interest in such a decision as was rendered by the Ohio Supreme Court, and this here is particularly so considering that it was the Ohio Chief Justice's own signature that consolidated a cause of action in the District Court. This matter of interest incidentally is borne out by the fact that Judge Pollock and Justice Weygandt both entered appearances in the District Court,

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* In this respect, the Ohio Supreme Court's allowance of the motion to certify had the practical effect in the cause of forestalling all remedy to bond or restraining order thus rendering to the respondent a definite benefit directly resulting from the prejudice.

a procedure which neither now considers necessary in the Circuit Court of Appeals, while at the same time the instant respondent is trying in the Circuit Court to set up the Ohio Supreme Court's decision as a defense against the injunction proceedings. If the respondent establishes any point in its reference to Rule 19, it is that the instant cause should be held for hearing in this Court until such time as the District Court proceedings can proceed to an ultimate outcome, either by decision in the Circuit Court of Appeals or by review in this Court with the instant cause.

3. Relative to the fiduciary appointment (respondent's brief, p. 5), Rule II, Section 1(C) of the Rules of Practice in the Ohio Supreme Court provides:

> "A notice of cross-appeal may be filed in this Court by an adverse party *within the time provided by law for the filing of a Notice of Appeal. Provided, however, that such party may deposit his notice of cross-appeal with the Clerk of the Court of Appeals or with an Administrative Board and with the Clerk of this Court, with instructions to said Clerks or Board to file such notice of cross-appeal upon the filing of Notice of Appeal by the appellant.* As amended January 8, 1952."

It is to be noted that the fiduciary appointment was denied by the Probate Court prior to expiration of time for appeal (Petition, pp. 5 and 10), thus denying joinder of the fiduciary who then could become an appellant in the cause.

4. It is significant that the respondent reverts to a language dodge relative to the application for continuance. The respondent does not deny the application's existence or the fact of its having been forwarded for filing. The respondent instead refers to its not being in the rec-

ord. That it does not appear in the record is exactly the type of thing about which the petitioner is complaining (Petition, pp. 8 and 9). The content of the application is set forth herein as Appendix 8. The "Objections" which were filed February 24, 1955 make reference to this continuance application and in effect were exceptions to relief already requested and denied.

5. As to the remedy which the respondent claims the petitioner to have pursuant to *Johnson v. Johnson*, 51 Oh. St. 446, 38 N. E. 61 (1894), the petitioner again emphasizes that the probate statutes of Ohio were amended in 1932, and the amendments in that year transferred the petitioner's remedy into the jurisdiction of the Probate Court. The petitioner in this cause sought the proper remedy. The injection of a fallacious remedy into the proceedings in order to justify an adverse judgment can hardly be said under the circumstances herein to have been in the name of justice and due process of law.

6. The respondent seeks finally to justify the instant Sexton decision on the basis of Ohio law. To refute that contention, the petitioner merely has to quote what has now become a famous letter in the cause, a letter of which the Probate Judge in question apparently was not aware at the time of his jurisdictional decision. The content of this letter is set forth in the motion to advance the cause and extend time for argument filed in the Ohio Court of Appeals. It was written over the signature of Irene A. Lennon, the then counsel for the respondent, under date of August 6, 1953, and in its pertinent parts (which very aptly quote the Probate Judge in the cause) is as follows:

> "Prior to making any statements relative to this case, I wish to express to you the high regard I have always had for Mr. Nolan and my respect for his integrity. In the minds of the people of Painesville

and Lake County, he has been known as one of the most able members of the bar. The statements which I make, I want you to understand, are not being made with any intention to reflect upon him. Almost two years ago he had a very serious illness from which few people, including the doctors, thought recovery was possible. For one who has maintained a law office more than fifty years, to close it is almost impossible.

"I have investigated the Elizabeth Sexton matter referring also to the Patrick Sexton Estate and the Ellen Sexton Estate. I agree with you and have so explained to Mrs. Barry, the account in The Cleveland Trust Company known as savings account A162445, which, at the time of Elizabeth Sexton's death, with interest, amounted to One Thousand Ninety Dollars and Seventeen Cents ($1090.17) actually belongs in the Patrick Sexton Estate and would pass under his will. The commercial account at the Willoughby office which at the time of her death amounted to One Thousand One Hundred Eighty-three Dollars and Seventy-one Cents ($1183.71), was a joint survivorship account in favor of Eleanor Sexton Barry. This, too, did not belong in the estate. Therefore, the only item belonging to the estate was the rental due from Frank Sexton.

"I have discussed with Judge Pollock the assets in this estate and the fact that I am representing Mrs. Barry in its administration. I agree with him that because the inventory has been filed and the bank accounts transferred into the estate, it will be necessary to have a court order regarding the disposition of these items. Evidence should be offered. The probated will of Patrick Sexton will dispose of one of the bank accounts. I have a statement from J. D. Mooney, assistant manager of the Willoughby office of The Cleveland Trust Company relative to the survivorship account. I trust that will be satisfactory to you rather than to have one of the officers

present. It is my intention and I believe your intention to take care of this matter with as little fuss and expense as possible, and for this reason I see no purpose in a court stenographer at the time of the hearing. * * *"

Then consider in conjunction with this letter that this same Probate Judge never once in six days of trial thought to deny his jurisdiction only thereafter to decide that he couldn't even hear the case. Of further significance as one reads this letter is the fact that even now in this Court the respondent by her silence is compelled to concede the New York authorities which are relied upon by the Ohio Supreme Court as supporting in reality the petitioner's contentions.** In this respect, the life beneficiaries as to corpus or principal are trustees and accountable as such to the Probate Court, and the non-performance of responsibilities by a Probate Court cannot destroy this jurisdiction. That was the holding of the Ohio Court of Appeals, and in so deciding the Ohio Court of Appeals followed Ohio law (Appendix 6, pp. 36-40). The Ohio Supreme Court, on the other hand, quite obviously did not follow Ohio or any other law.

7. The petitioner respectfully submits that the circumstances of this entire cause are a proper area for the exercise of this Court's power of review on certiorari.

Petitioner therefore prays that this petition for certiorari be granted.

Respectfully submitted,

JAMES F. SEXTON,

Attorney for Petitioner.

** In citing New York law (163 Oh. St. 133, Petitioner's Appendix, pg. 50), the Ohio Supreme Court actually established the life beneficiaries herein as being trustees, in respect to which see pages 13 and 14 of the Petition.

APPENDIX 8.

No. 34,079

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
SEVENTH DISTRICT, LAKE COUNTY

IN RE ESTATE OF PATRICK SEXTON, DECEASED

JAMES F. SEXTON,
Complainant-Appellee,
VS.
ELEANORE M. BARRY,
Defendant-Appellant.

Application for Continuance and Extension of Time.

Now comes the complainant-appellee and prays for an order of this Honorable Court continuing all proceedings, including the filing of all motions, records and briefs in the above estate and case pending final disposition of Case No. 31,514 now on file in the District Court of the United States, Northern District of Ohio, Eastern Division, in which this Honorable Court as constituted on December 17, 1954 and the Chief Justice thereof are defendants, and in which Eleanore M. Barry, defendant herein, is a party, inasmuch as said Case No. 31,514 has a direct and material bearing and effect upon the instant proceedings.

Respectfully submitted,
JAMES F. SEXTON.

PROOF OF SERVICE.

A copy of the foregoing application has been forwarded this 3rd day of January, 1955, to Wm. M. Hubbard and Irene A. Lennon, c/o Irene A. Lennon, Painesville, Ohio, the attorneys for Eleanore M. Barry, the defendant-appellant.

JAMES F. SEXTON.